"PARCing" INFORMATION THROUGHOUT THE CORPS (PARC Staff)

Comptroller General's Decision Sustains Bid Protest, Based Upon the Bidder Attempting To Limit the Rights of the Government. *(Michael Organek, CEPR)*

Background:

- On February 10, 1999, the Comptroller General sustained a post-award protest by Company "B" concluding that the awardee's bid, "Company "A", under an invitation for bid (IFB) issued by a USACE District, for repair and improvement of jet fuel storage area, was nonresponsive because it modified material terms of the solicitation, limited the contractor's liability to the government, and limited the rights of the government under the contract.

- The District issued the IFB with an established date for bid opening. The total lump sum price for purposes of evaluation and award was to include a total of nine "major work items" listed in the IFB. Prices were sought for seven basic items relating to repairs and upgrades at the Pumphouse No. 1 site, and two options relating to repairs and upgrades at the bulk fuel storage tanks. Item No. 0009, the option item central to this case, involved lowering the high-level shut-off valves on three bulk fuel

  storage tanks.

- Twelve bids were received at bid opening. Company "A" was the apparent low bid, and Company "B" was the apparent second low bidder.

- The bid submitted by Company "A" included the following statement, identified as a bid "qualification":

  Bid Item #9 – Tanks will be cleaned and gas free by government before commencement of work.

Facts surrounding the bid protest:

The contracting officer rejected Company's "A" bid as nonresponsive because the statement placed a condition on the bid. In written notice to Company "A" the Contracting Officer cited Federal Acquisition Regulation (FAR) ∋ 14.404-2(d), which provides:

> [a] bid shall be rejected when the bidder imposes conditions that would modify requirements of the invitation or limit the bidder's liability to the Government, since to allow the bidder to impose such conditions would be prejudicial to other bidders.

- **Company "A" responded to the contracting officer with a letter of protest, asserting that the solicitation required award to it as the lowest bidder, and that the bid qualification could be waived as a minor informality, since, there was not a specified condition requiring the tanks be cleaned and gas-free.** A

second letter followed the protest from Company "A", notifying the contracting officer that the qualification to Bid Item No. 9 was being withdrawn.

- *After receiving legal and technical counsel, the contracting officer determined Company "A" should be allowed to delete the qualification from its bid because the condition was one of form, not substance. See FAR '14.405. This decision was based on a finding that the qualification did not make Company "A" nonresponsive, because the contract specifications did not specifically require work to "clean" the tank and make them "gas-free." Accordingly, award was made to Company "A", and Company "B" filed its GAO protest.*

- **The Comptroller General stated at the outset of its legal analysis, that to be responsive and considered for award, a bid must contain an unequivocal offer to perform, without exception, in total conformance with the material items of the solicitation. The purpose for this requirement is to deny individual bidders the opportunity to reserve rights or immunities that are not extended to all bidders by the conditions and specifications advertised in the IFB. Therefore, a bid must be rejected if in it, the bidder imposes conditions that would modify material requirements of the invitation or limit the government's rights under any contract clause. Moreover, the Comptroller General noted that a bid which is facially nonresponsive cannot be made responsive by post-bid opening clarifications or corrections.**

- **The Comptroller General analysis turned to the instructions provided in the IFB for performance of Item No. 9, which tasked "lowering existing high level alarm valves for three of the above ground storage tanks", and stated the contractor would be working in an area with significant hazardous environmental. In light of the safety hazards, it was noted in the Summary of Work that special attention should be given to the "vapor-freeing of existing fuel components." The term "gas-free" in Company "A's" bid qualification can reasonably be interpreted as an attempt to pass the burden of ensuring compliance to the government, which is clearly inconsistent with the IFB. In other words, as the qualification increased the government's liability, it decreased that of Company "A", accordingly.**

- **The Comptroller General rejected that argument focused on the fact that the bid qualification, which made work contingent upon the government cleaning the tanks and making them gas-free, resulted in a conditioned bid that created obligations on the government, inconsistent with the IFB. Upon conclusion of its detailed analysis of the facts, the Comptroller General held that the qualifying terms of Company's "A" bid created an opportunity for Company "A" to correct or withdraw its bid, and such created a competitive advantage. The Comptroller General concluded that because the condition alters the legal relationship between the agency and the contractor, it is a matter of substance that cannot be waived to make the bid responsive. Moreover, the Comptroller General refused to accept Company's "A" low bid price as an argument for waiver, stating that "the possible monetary savings under a particular contract does not outweigh the importance of maintaining the integrity of the competitive bidding system by rejecting nonresponsive bids."**

Comptroller General's recommendation:

- **Finally, the Comptroller General recommended that the District terminate Company "A"'s contract for convenience and award a contract under the IFB to Company "B", if otherwise appropriate. A**

recommendation was also made for the District to pay Company "B's" reasonable protest costs and

Lessons Learned:

The lesson learned in this case is that the Contracting Officer originally made the correct determination to reject Company "A's" bid as nonresponsive. The IFB specifications and Statement of Work provided clear and reasonable requirements for the tank valve's upgrade, the liability for which was transferred to the Government by the qualifying statement. ***Company "A"should not have been allowed to waive its qualifying statement after bid opening***.

Inspection of the Acquisition of Information Technology

(Mary Fitzgerald, CEPR)

This report responded to the Commander's directive that the Engineer Inspector General conducts an USACE-wide inspection of the Acquisition of Information Technology. The following were evaluated for the Corps' investment for future practices:

Appropriate usage
Cost Effectiveness
Proper Management
Methodologies

The review recognized that in past reviews of the Corps' Information Technology (IT) initiatives, most of senior leadership had yet to embrace IT as an asset for effectiveness and Innovativeness for the command's future success.

a. The usage of an approved IT strategic plan and the process for evaluating and selecting did not have a sound set basis.

b. Activities are inconsistent in the manner in which they identify and report on their investments in automated information systems.

c. Adequate economic analyses or a measurement for performance tracking records does not support investments.

The above findings have determined that USACE does not treat IT projects as significant investments and manage them accordingly.

The Inspection report contains 40 recommendations in three major areas: Leadership and Training, IT Investment Management Process, and Contracting for IT.

SOURCE: USACE Engineer Inspector General Inspection Report, 15 APR 98

Additional Findings Worth Noting to Contracting Officers

SUBCONTRACTING

FINDING: Subcontractor hours and dollars being expended in support of the USACE Automation Plan (CEAP) contract are not being identified as such for pricing and invoicing purposes.

RECOMMENDATIONS:

1. PARC issue guidance on comprehensive pricing and invoicing strategies for significant (e.g., 40%+ of total direct labor hours) subcontracted effort required under contracts for support services.

2. HQUSACE Director of Information Management ensure that contracting office responsible for awarding the next CEAP contract specifically address, in the terms and conditions of the contract, the manner in which anticipated subcontract effort is to be handled from a pricing and administration perspective.

MARKET RESEARCH

FINDING: Corps contracting offices are not conducting a thorough market research in their efforts to acquire IT supports services.

RECOMMENDATIONS:

1. PARC issue guidance on the use of Government wide Agency Contracts (GWACs), emphasizing the need to do market research (of a depth appropriate for the circumstances) prior to entering into/renewing an interagency agreement.
2. PARC in coordination with Office of Chief Counsel, issue guidance on the preparation of the "determinations and findings" mandated by the Economy Act, or determine that the Clinger-Cohen Act applies.
3. Commanders ensure that adequate market research is conducted before entering any contract or interagency agreement for support services.

PERFORMANCE MONITORING:

FINDING: The level of performance monitoring of contractors providing support services at Corps offices does not ensure that work accomplished is commensurate with hours expended.

RECOMMENDATIONS:

1. PARC coordinate with Director of Information Management to issue guidance regarding the detail required in monthly progress reports in contracts for IT support services.
2. Commanders ensure that monthly progress reports are of sufficient detail to ensure that work accomplished is commensurate with the hours expended.

PERSONAL SERVICES CONTRACTS

FINDING: Some of the Corps' contracts for IT supports services contain elements peculiar to a personal service contract.

RECOMMENDATIONS:

Commanders ensure that the Statements of Work of their contracts for IM support services are of sufficient detail to avoid the perceptions that they are personal service contracts.

ROLES AND RESPONSIBILITIES FOR IT ACQUISITION POLICY

FINDING: Current guidance gives overlapping roles and responsibilities for IT acquisition.

RECOMMENDATIONS

USACE Chief of Staff clarify the roles and responsibilities of the PARC, Director of Information Management, Resource Management, and other key HQUSACE personnel in IT acquisition and management.

PARC Note: ***The foregoing is a heads-up on forth coming guidance and highlights the critical need for Clinger Cohen training for contracting officers buying Information Technology equipment and services.***

CENTRAL CONTRACTOR REGISTRATION (CCR)

(*Roger Adams, CEPR-P)*

Central Contractor Registration (CCR) is a relatively new DOD-wide system. Since there have been many requests from contractors for the information below, it is provided for your information and use.

Facts:

a. Per DFARS 204.7302, after 31 May 1998, prospective contractors must be registered in the CCR database **prior to award of a contract, basic agreement, basic ordering agreement, or blanket purchase agreement, unless the award results from a solicitation issued on or before 31 May 1998**.

This mandate applies to all types of awards except:

(1) Purchases made with Governmentwide commercial purchase cards.

(2) Awards made to foreign vendors for work performed outside the U.S.

(3) Classified contracts or purchases.

(4) Contracts awarded by deployed Contracting Officers in the course of military operations or contracts awarded in the conduct of emergency operations.

(5) Purchases to support unusual or compelling needs of the type described in FAR 6.302-2.

b. **Purpose of CCR** – To ensure DoD compliance with the Debt Collection Improvement Act of 1996. This process facilitates registration by a commercial company as a Trading Partner with DoD. It will eventually supplant the use of SF 129 (the Solicitation Mailing List Application) form of registration; a contractor will only need to register once and not with each Contracting Office within DoD. Also, it provides the DoD finance offices a means to verify payment data for electronic payments to the contractors. If a contractor is not in the system, he/she will not be paid.

c. **Origination of Requirement** – This was one of the results of the Debt Collection Improvement Act of 1996. DoD's requirement came out of the Office of the Undersecretary of Defense.

d. **Registering in the Database** – Instructions, forms and guidance for registering are found on the Internet at the following address, "http://ccr.edi.disa.mil". There are three methods for registering a company in the CCR database.

(1) If a contractor has arranged for EDI capability through a Value Added Network (VAN) that deals with the Government, they can help the contractor register through an electronic transaction known as an 838 Trading Partner Profile. This is the quickest and easiest method for EDI-capable firms.

(2) Register electronically by accessing the on-line Central Contractor Registration form. The CCR Registration allows the contractor to submit a basic registration as well as a more detailed registration.

(a) The basic registration, referred to as the 'EZ' Registration, covers the minimum amount of information required by the Government to register with CCR.

(b) A detailed registration allows the contractor to provide Optional Information (e.g. security and quality standards met by the company, Federal Stock Classes/Product Service Codes

which apply to the goods or services, which the contractor sells. It also allows a contractor to register his or her company as EDI-capable.

(3) For those firms who do not want to register electronically, they can complete the paper registration form and mail or fax the application to the appropriate Registration Assistance Center (RAC). The registration

form can be obtained from the same internet address stated above.

(4) After receipt of the completed registration form, it takes 15-30 days to enter the information into the system.

e. ***Handling of Subsidiaries, Subcontractors, and Joint Ventures under CCR*** – If subsidiaries, subcontractors or joint ventures are to receive any direct payments from the Government, then they will have to likewise be registered. Each member of a joint venture must be registered before a contract can be awarded; the joint venture will not register as a separate entity. ***Also, as stated before, no contract can be awarded unless the awardee is registered.***

f. ***Security and Maintenance of System*** – Each contractor will provide their own data to the Government, who will initially enter it into the system. They will be assigned a Trading Partner Identification Number (TPIN #). This is a security code/number that allows only that contractor to access his/her personal database. No other contractor can access this database unless they give them the number, which of course is discouraged. With this number, a contractor can update and change information when needed; however, the minimum requirement for a firm to update it is annually. The Government does not make changes to the account, the individual contractor does. Only, the following Government personnel have access to this database:

(1) Contracting Officers – currently have limited access and can only ascertain whether contractors are registered, or not.

(2) Information Management Personnel – those who maintain the system have unlimited access; however, they have to sign on to the system and utilize a password.

(3) DoD Finance – they have unlimited access; however, they also must sign on and use a password.

INDUSTRIAL RELATIONS UPDATE

(*Kathleen Love, CEPR***)**

The following information is extracted from Contractor Industrial Relations (CIR) Information Letter No. 98-6, published by the Office of Chief Counsel.

I. DEPARTMENT OF LABOR'S CLARIFICATION OF ALL AGENCY MEMORANDUM NUMBER 157.

On Friday, 20 November 1998, the Department of Labor (DOL) published a notice in the Federal Register (63 FR 64542) relating to the DOL's All Agency Memorandum Number 157, dated 9 November 1992. This Notice was published in order to comply with the Department of Labor's Administrative Review Board (ARB) decision of 17 July 1997. In ARB Case No. 96-133, the ARB upheld the DOL's position concerning the exercise of an option obligating a contractor to perform work for a period of time for which it was not obligated under the terms of the original contract. The DOL has maintained that under such circumstances a new contract has been created for purposes of requiring the incorporation of a new wage determination.

By way of background, the issue of Davis-Bacon Act requirements in connection with option provisions has been the basis of long standing contention between the Department of Labor (DOL) and the Department of the Army. ***As noted above, the DOL's position has been that the exercise of an option extending the period of performance***

represents the commencement of a new contract. In support of its position, the DOL noted the requirements under 29 CFR 4.145 (a) of its Service Contract Act regulations to obtain current Service Contract wage rates with the exercise of options in service contracts. The Department of Army's Labor Advisor did not concur in the DOL's position arguing that the DOL, in adopting this position, failed to comply with the rule making provisions of the Administrative Procedures Act (5 USC 553). The Labor Advisor determined that the DOL's reliance upon its Service Contract Act regulations in this matter was inappropriate. Accordingly, by means of Acquisition Letter 94-6, the Army Labor Advisor directed the Army not to comply with the provisions of the All Agency Memorandum.

In view of the ARB decision, the Army Labor Advisor has determined that the previous DA position set forth in Acquisition Letter 94-6 is no longer valid. The FAR Labor Committee is currently developing FAR guidance in accordance with the DOL's policies as set forth in the All Agency Memorandum as clarified by the 20 November Federal Register Notice.

II. APPROVAL OF WAGE RATES UNDER COST REIMBURSEMENT CONTRACTS.

The Office of Counsel has received a number of inquiries relating to the application of FAR Clause 52.222-16, *Approval of Wage Rates* in solicitations and contracts for cost-reimbursement construction. In particular, these inquiries suggest that this clause has been cited by contracting officers and contractors as establishing Davis-Bacon Act wage rates as both a minimum wage rate to be paid by contractors and the maximum wage rate for which the Corps will reimburse its contractors. For purposes of the following discussion, the clause is set forth below.

Approval of Wage Rates (Feb 1988)

All straight time wage rates, and overtime rates based thereon, for laborers and mechanics engaged in work under this contract must be submitted for approval in writing by the Head of the Contracting Activity or a Representative expressly designated for this purpose, if the straight time wages exceed the rates for Corresponding classifications contained in the applicable Davis-Bacon Act minimum wage determination included in the contract. Any amount paid by the contractor to any laborer or mechanic in excess of the agency approved wage rate shall be at the expense of the Contractor and shall not be reimbursed by the Government. If the government refuses to authorize the use of the overtime, the Contractor is not released from the obligation to pay employees at the required overtime rates for any overtime actually worked.

As a preliminary matter, it is noted that the Davis-Bacon Act was enacted as a labor standards protective measure. The Act was "designed to protect local wage standards by preventing contractors from basing their bids on wage rates lower than those prevailing in the area." (House Committee on Education and Labor. Legislative History of the Davis-Bacon Act. 87th Cong. 2nd Session. (Comm. Print 1962)). There is nothing in the legislative history to indicate that its intent was to form a maximum wage rate or ceiling. The Supreme Court, in the United States v. Binghamton Construction, Inc. 347 U.S. 171 (1954) noted that the "…Act is a minimum wage law designed for the benefit of construction workers. The Act does not authorize or contemplate any assurance to a successful bidder that the specified minima will in fact be the prevailing rates. Indeed, its requirement that the contractor pay "not less" than the specified minima presupposes the possibility that the contractor may have to pay higher rates."

Recently, the Office of Counsel has received inquiries from construction union representatives wherein it is alleged that Government prime contractors have been advised by USACE Contracting Officers that the above FAR clause prohibits the Government from reimbursing contractors for any wages paid in excess of those set forth in the contract Davis-Bacon Act wage determination. As a result, contractors with whom the unions had been negotiating collective bargaining agreements have refused to bargain. The net effect of such interpretation of the subject FAR clause may be to expose USACE to possible litigation based on its improper interjection in the collective bargaining arena established under the National Labor Relations Act. Further, it is at least arguable that such an interpretation places the Government in the position of assuring that labor could be recruited at the Davis-Bacon Act wage rates.

Contracting Officers are advised that the subject clause requires contractors seeking reimbursement under-cost reimbursable contracts to obtain written approval by the Head of the Contracting Activity when the straight time wages exceed the rates for corresponding classifications contained in the applicable Davis-Bacon Act minimum wage determination included in the contract. In accordance with established cost principles, these costs must be allowable and allocable.

Y2K

(LTC Tillman, CEPR)

I am sure everyone within the Corps of Engineers has heard by now of the potential for disaster to our information systems at the turn of the century, Year 2000 (Y2K). The Corps is and has been aggressively seeking for many months now to establish methods for ensuring that our information technology will accurately process date/time data from, into, and between the twentieth and twenty-first centuries. The danger is that many of the projects that we have worked on over the last twenty or so years (buildings, subsystems, dams, locks, etcetera) have incorporated some form of an information processing clock into its functional characteristics which is not known today and will not operate properly after the change to the year 2000. A building's elevators, or heating and air conditioning system, or even the security system within an office may malfunction with the turn of the new century. I am sure you can imagine some of the possibilities and also the difficulties we are having with identifying all the problem areas. For our part (the contracting chain of command) in helping to rectify this situation, we have begun reviewing all active contracts (not closed out), excluding credit card or small purchases (≤$25,000/purchases recorded on a DD Form 1057), to determine which contracts have a need for modification and which projects will require some other type action (the contract, itself, may be too far along to modify now). This information is reported monthly through the Information Management chain of command to the Chief of Engineers as a part of the Commanders Y2K Survey. It does not matter if the contract was for construction, goods, services, or A&E, we are merely stating a percentage of the total number of contracts which have been fully reviewed for Y2K implications. ***Our intention with this exercise is to ensure that we do not accidentally over-look a contract needing some corrective action to make the product Y2K compliant.*** You may also review the Y2K Contracting Readiness chart through the Internet at http://www.usace.army.mil/im/ceimp/y2ksurvey.html. PLEASE NOTE: This review was to be completed by 31 December 1998 in accordance with previous CEIM guidance.

Coincidental to this review, the PARC has asked for a listing of all identified active contracts that do not, but should have included Y2K compliance language and what actions are being taken to obtain compliance. By simply registering the contract numbers during the review described above (contracts which your command determines will require some action) and stating whether the action is either to modify the existing contract to include the compliance

requirement, to seek guidance from the requiring activity, or solicit a new contract to modify the resulting product

(whatever your command deems as appropriate), you are helping to ensure the Corps is better prepared to face the impending future. This small, monthly act identifies your intended plan of action for making each of the contracts Y2K compliant.

In addition, the PARC has previously published memoranda (such as CEPR-P memorandum, dated 18 September 1998, subject: Year 2000 (Y2K) Compliance) indicating that effective 1 October 1998, contracting officers are not to sign any contractual instruments that obligate funds for any information technology or national security system requirements that process date-related information that does not contain Y2K requirements specified in FAR 39.106. This edict also pertains to credit cards and small purchases, which do not normally have the full statement of work

available for review as mentioned above. While these small purchase type situations typically pertain only to commercial items or non-critical incidental parts, there is the potential for a critical element of a system to be purchased using a credit card.

To assist contracting officers developing solicitations, the following Y2K compliance language is recommended for inclusion in Section 00800 of construction contracts and is intended to standardize the Y2K requirement throughout the Corps:

Year 2000 Compliance:

a. In accordance with FAR 39.106, the contractor shall ensure that with respect to any design, construction, goods, or services under this contract as well as any subsequent task/delivery orders issued under this contract (if applicable), all information technology contained therein shall be Year 2000 compliant. Specifically:

b. New Contracts. The contractor shall:

(1) Perform, maintain, and provide an inventory of all major components to include structures, equipment, items, parts, and furnishings under this contract and each task/delivery order, which may be affected by the Y2K compliance requirement.

(2) Indicate whether each component is currently Year 2000 compliant or requires an upgrade for compliance prior to government acceptance.

b. Existing Contracts. For existing construction contracts which presently do not contain the requirement

for Y2K compliance, use the statements in paragraphs a and b above, to effect any required modification to the contract.

d. Architect and Engineer Contracts. The following language is provided for requesting Y2K compliance to be included in all products:

"Year 2000 Compliance; the Architect/Engineer (A-E) shall insure that the hardware, firmware, software, and information technology systems separately or in combination with each other or other elements specified in the documents developed under this contract shall be year 2000 compliant in accordance with FAR 39.106."

The Y2K contract compliance language provided for IT supply and services contracts in SARD-PP, memorandum dated 21 October 1997, subject: Assuring Year 2000 Compliance in Information Technology (IT) Contracts,

remains in effect.

Should you have any specific Y2K contracting questions, please contact LTC Martin R. Tillman of my staff at (202) 761-8641 for assistance. Together we can minimize the negative impact on our information systems during the transition period into the new millennium.